ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.



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| In re Applications of | ) | MM Docket No. 93-75 |
| | ) | |
| TRINITY BROADCASTING OF FLORIDA, INC. | ) | File No. BRCT-911001LY |
| | ) | |
| For Renewal of License of Station WHFT(TV), Channel 45, Miami, Florida | ) | |
| | ) | |
| GLENDALE BROADCASTING COMPANY | ) | File No. BPCT-911227KE |
| | ) | |
| For Construction Permit for a New Commercial TV Station on Channel 45 at Miami, Florida | ) | |



To: The Commission

**REPLY COMMENTS OF NATIONAL MINORITY T.V., INC.**
**ON OPPOSITIONS TO MOTION TO VACATE**

National Minority T.V., Inc. ("NMTV"), by its attorneys, hereby submits its Reply Comments concerning the Opposition to Motion to Vacate filed in the above-referenced proceeding by the Mass Media Bureau (the "Bureau").[1/] As set forth herein, the Bureau's Opposition fails to refute the positive proof contained in Trinity's Motion to Vacate and NMTV's Comments thereon that this proceeding was erroneously designated for hearing and that the resulting hearing was fundamentally flawed by the Commission's erroneous interpretations of law.[2/]

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1/ Simultaneously herewith, NMTV is requesting leave to file this Reply.

2/ This Reply focuses on the Bureau's Opposition. NMTV notes that Oppositions to the Motion to Vacate were also filed by Glendale Broadcasting Company ("Glendale") and (continued...)

HDO's error had on the Presiding Judge and the Initial Decision ("ID") he reached. Examination of only a few paragraphs of the ID reflects that the Judge inextricably intertwined the low power and full power rules. Paragraphs 324-326 of the ID, for instance, demonstrate that the Judge erroneously lumped together what he felt were violations of the low power and full power rules. Had the Judge been apprised that Trinity and NMTV's interpretation of the low power rules was indeed correct, he would have been able to understand that Trinity and NMTV's interpretation of the minority exception to the full power rule, based on advice from their FCC attorney, was correct, or at the very least, reasonable.

3. It is well established that "a finding is 'clearly erroneous' if it is without substantial evidentiary support or if it was induced by an erroneous application of the law. Beyond that, [a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Case v. Morisette, 475 F.2d 1300 (D.C. Cir. 1973). There is no question here that the Judge's findings with respect to the low power applications were based on an erroneous application of the law, and that application led to an unfair evaluation of Trinity and NMTV's position with respect to the minority exception to the full power television rule. The Bureau's refusal to admit openly that the HDO was wrong and to address the impact of that error is astonishing.

## II. The Bureau's Analysis of the Minority Exception to the Full Power Rules Is Premised on Inferences and Unsupported Statements as to What the Commission "Intended."

4. When it comes to the minority exception to the full power television rules, the

Bureau's analysis inexplicably changes. In the face of overwhelming evidence that the term "minority-controlled" for purposes of the full-power minority exception was defined exactly as it was for the LPTV minority preference, the Bureau is left to speculating on what the Commission must have "intended" when it adopted the minority exception. Despite the lack of any supporting precedent, the Bureau submits that the Commission intended that minorities have both de jure and de facto control.

5. This attempt to distinguish the minority exception from the low power minority preference does not withstand scrutiny. As even Glendale recognizes and concedes, "Congressional pressure prompting the adoption of this rule change [to allow two extra full power television stations for minority-controlled licensees] came from the same loins as Congressional passage of the minority-preference lottery legislation for television translators and low power television station licenses. The language used in the lottery legislation, requiring more than 50% minority ownership, was used in bills introduced in Congress and adopted by the Commission." (Glendale Opposition at 44, emphasis added). Indeed, the Bureau itself agrees that "the Commission took its cue from Congress" in determining the requisite level of minority ownership (Bureau Opposition at 13) and observes that the Commission's adoption of rules to choose low power television licensees is "instructive." (Id. at 12). However, the Bureau then mistakenly asserts that the word "control" does not appear in the discussion or rules for the awarding of low power television preferences. In fact, the word "control" does appear in the discussion of the low power minority preferences, and as Trinity has argued, the definition of "minority controlled" in the full power rule is essentially identical to the definition adopted for low power. See Random Selection

Lotteries, 93 F.C.C.2d 952, 953 (1983) and Trinity Motion to Vacate at 47-48, 56.

6. Proceeding from an erroneous premise, and citing nothing that counters the compelling legislative and administrative history noted by Trinity, the Bureau simply speculates as to what the Commission "intended." The "intent" perceived by the Bureau, however, can be discerned nowhere in the legislative and administrative history. The Bureau argues in its summary that "the Commission intended that minorities not only have de jure but also de facto control of full power stations to qualify for the minority controlled exception." (Bureau Opposition at ii). But, in its argument, the Bureau admits that the Commission failed to explicitly require that minority group members have both de jure and de facto control of an entity. (Id. at 6-17). Not only does the Bureau concede that there is absolutely no precedent distinguishing the full power minority exception from the low power minority preference, it does not dispute that the Commission never gave any guidance to non-stock non-profit entities such as NMTV.

7. The Bureau's unfounded speculation is adorned with arguments that simply beg the key question. For instance, the Bureau claims that "the Commission stated that its 'intention, of course, in permitting increased levels of multiple ownership only where minority-controlled stations are involved is to encourage investment in and support for these stations'." This contention is meaningless unless the term "minority-controlled" is defined. As Trinity and NMTV have established, the rule and its history are clear: "minority-controlled" means "more than 50% owned by one or more members of a minority group." Thus, the Bureau's circular attempt to define Commission "intent" by referring to "minority-controlled stations" actually leads to the conclusion that minority control for purposes of the

full-power exception was based exclusively on ownership.

8. The Bureau's analysis of the interests that non-minorities could acquire in stations covered by the minority exception further exemplifies the lack of any definable Commission "intent" supporting the Bureau's position. For instance, the Bureau acknowledges that, under the minority exception, "non-minorities could hold cognizable interests and become officers, directors and/or stockholders in minority controlled stations in order to assist them and support those stations." (Bureau Opposition at 17). According to the Bureau:

> Such an interest could be an influential one. It could be an interest that would allow the non-minority to protect his investment and provide guidance. It could be an interest which in other contexts, could be presumed to be controlling, and in the context of a minority controlled entity, so influential as to warrant inclusion in a determination of the total number of cognizable interests held by such a person.

(Id. at 18, emphasis added). If that is the standard, there are three points to make. First, until now neither the Bureau nor the Commission has ever announced that standard. Second, the boundaries of the standard are far too vague to give adequate notice of the rules of conduct. And third, it is impossible in any event to conclude from the record that Trinity *violated* the Bureau's newly-declared standard.

## CONCLUSION

In sum, the Bureau's Opposition fails to rebut the compelling and well-documented argument in Trinity's Motion to Vacate that the Commission's HDO was fundamentally flawed. Since the interpretations of the low power minority preference and the full power

minority exception which Trinity and NMTV made, upon advice of counsel, were clearly correct and, at a minimum, reasonable, the Commission must grant the relief requested in the Motion to Vacate.

Respectfully Submitted,

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## I. The Bureau Agrees That Trinity and NMTV Correctly Interpreted the LPTV Minority Preference

1. Significantly, the Bureau continues to agree with the arguments that have been advanced by Trinity and NMTV with regard to the low power minority preference. Specifically, the Bureau states that it "has consistently advocated that Trinity did not abuse the Commission's processes with respect to NMTV's claims of preference for low power television station construction permit applications." (Bureau Opposition at ii and 4 n.1). Indeed, the Bureau notes that it carefully considered the entire record in arriving at this conclusion. (Id. at 4 n.1). Thus, insofar as the Hearing Designation Order ("HDO") was based on a purported abuse of process of the LPTV rules, the Bureau concedes that the HDO erred. As a result, that portion of the HDO must be vacated.

2. Unfortunately, the Bureau fails to recognize the damaging impact that the

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2/ (...continued)
the Spanish American League Against Discrimination ("SALAD"). SALAD's Opposition contains nothing of substance. Glendale's Opposition -- which is largely devoted to massive quotations of the Initial Decision -- contains only two points of any moment: (i) that the existence of Section 310(d) of the Communications Act leads to the conclusion that de facto control was required under the minority exception; and (ii) that the real-party-in-interest certifications on NMTV's LPTV applications are evidence that de facto control was a requirement of the minority preference. As to the first argument, Glendale's citation of Section 310(d) is unhelpful to its case, for Section 310(d) is merely the Communications Act's generic prohibition on the transfer of "control" of a broadcast license without prior consent. The critical question is what constitutes "control" in a given case. As Trinity and NMTV have shown at length, "control" for purposes of the LPTV minority preference and the full-power television minority exception was specifically defined with reference to ownership alone. Glendale's second argument ignores the fact that real party in interest questions arise only where someone undisclosed in the application has an ownership interest or is in a position to control the applicant. Lowrey Communications, L.P., 7 FCC Rcd 7139, 7147 (¶32) (Rev. Bd. 1992). Here, Paul Crouch's interests in NMTV and as President of Trinity were clearly disclosed when the applications were filed, and NMTV's By-Laws, which were provided to the Commission, gave him the authority to direct and control NMTV's affairs subject to the de jure control of the Board.

## CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **"REPLY COMMENTS OF NATIONAL MINORITY T.V., INC. ON OPPOSITIONS TO MOTION TO VACATE"** was served on this 5th day of December, 1996, by first U.S. class mail, to the following:

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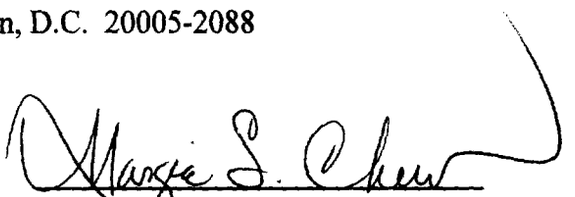

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*** Via Hand-Delivery**